PUBLIC PROSECUTOR

v.

MUHAMAD BIN CHIKUNA

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[CRIMINAL APPEAL NO. T(42) - 1 OF 1993]
19 JULY 1993

CRIMINAL APPEAL: Charge of impersonating a public servant - Penal Code s. 170 - Ingredients of offence - Whether offence of impersonation disclosed - Accused made verbal promise to complainant - Whether mere promise an "act".

CORROBORATION: Corrupt solicitation - Prevention of Corruption Act, 1961 s. 3(a)(i) - Whether corroborative evidence required - Whether there was corroboration - Complainant lodged report on same day of alleged solicitation - Trap laid one day later - Whether report and entrapment amounted to corroboration.

WORDS AND PHRASES : "Act" - Section 170 Penal Code.

This was an appeal by the Public Prosecutor against the decision of the learned President of the Sessions Court, Tawau for discharging and acquitting the respondent on charges of impersonation and corrupt solicitation under s. 170 of the Penal Code and s. 3(a)(i) of the Prevention of Corruption Act, 1961 respectively.

The first charge against the respondent was that he pretended to be a Registration Department officer and in such asssumed character did an act in that he claimed to the complainant that he could process the report of a lost identity card. The second offence was for corruptly soliciting from the complainant RM150 as an inducement for helping to process the report of the said lost identity card. Both offences were alleged to have taken place at the Jabatan Pendaftaran Negara Tawau on 4 June 1984. In respect of the second charge the respondent was charged jointly with two others both of whom had been found guilty and convicted by the learned President.

The evidence as led by the prosecution showed that two meetings took place at the office of the Jabatan Pendaftaran Negara Tawau between the respondent and the complainant. At the first meeting on 4 June 1984 the complainant asked for the respondent's help to replace a lost identity card to which the respondent told the complainant that it could be done for RM150. The complainant then went to the Anti Corruption Agency (ACA) and lodged a report. A trap was set by the ACA and on the next day, accompanied by an ACA officer, the complainant again met the respondent at the same place. At this meeting the complainant handed to the respondent and the respondent accepted, RM50 together with several documents pertaining to his application to replace the lost identity card. The complainant was all the while under the impression that the respondent was a staff of the Jabatan Pendaftaran Negara Tawau because the respondent was wearing a name tag and also because the respondent was always present in that office.

The learned President called the respondent to enter his defence on the second charge but he was nevertheless acquitted on the grounds firstly, that there was no certainty in the evidence as to whether the respondent took the RM50 for himself or for the second accused and secondly, that no demand was made by the respondent for the RM50.

Held:

[1] The charge under s. 170 of the Penal Code against the respondent cannot succeed as it discloses no offence. One of the ingredients of the offence under s. 170 of the Penal Code is that an accused person "does or attempts to do any act" under colour of the office he pretended to hold. A claim by someone that he could do something without more is not "an act" within the meaning of that section.

[2] As the learned President had ruled that the complainant is a truthful witness and that there was corroboration to his evidence on the solicitation of the RM150 by the respondent, it would require very solid grounds to hold that the defence had cast a reasonable doubt on the prosecution case. It matters not whether the RM50 given on 4 June 1984 was for the respondent or for the other accused and nor does it matter that the respondent had not demanded the RM50 on 5 June 1984. Those facts do not in any way detract from, contradict or rebut the evidence of the complainant that the respondent had solicited from him RM150 on 4 June 1984, which evidence was corroborated by the fact of a report of the complainant to the ACA which was made on the same day.

[3] None of the grounds mentioned by the learned President for acquitting the respondent

on the second charge could create any doubt in the prosecution case and therefore the respondent ought to have been convicted of the said charge.

[Appeal against acquittal on the first charge dismissed. Appeal against acquittal on the second charge allowed].

Cases referred to:
Tomm Wong v. PP [1973] 1 MLJ 215 ***(refd)***
Lee Swee Tee v. PP [1960] MLJ 161 ***(refd)***
PP v. Sharikat Perusahan Makanan Haiwan Berkerjasama-berkerjasama [1969] 2 MLJ 250 ***(refd)***
PP v. Kian Mei Sdn. Bhd. [1992] 4 CLJ 2168 ***(refd)***
Lim Baba v. PP [1962] MLJ 201 ***(refd)***
Liew Wah Ming v. PP [1963] MLJ 82 ***(refd)***
Mohamed Ali v. PP [1962] MLJ 230 ***(refd)***
Karthiyayani & Anor. v. Lee Leong Sin & Anor. [1975] 1 MLJ 119 ***(refd)***
PP v. Lim Kuan Hock [1967] 2 MLJ 114 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 157
Penal Code, s. 170
Prevention of Corruption Act 1961, ss. 3(a)(i), (ii), 18
Penal Code, s. 170 (India)

Other sources referred to:
Chitaley & Rao's **Commentaries on the Indian Code**, Vol. 2, 2nd Edn., at p. 188

For the Public Prosecutor - Mazelan bin Jamaluddin, DPP
Respondent in person

JUDGMENT

Ian H.C. Chin JC:

I. History of Case

This is an appeal by the Public Prosecutor against the decision of the President (as it was then known) of the Sessions Court of Tawau delivered on 18 September 1985 where the first accused, one Muhammad bin Chikuna ("respondent"), was discharged and acquitted of a charge of impersonation under s. 170 of the Penal Code and of a charge of corrupt solicitation under s. 3(a)(i) of the Prevention of Corruption Act 1961. The respondent was jointly tried with two others in respect of charges under s. 3(a)(ii) of the Prevention of Corruption Act 1961; the two others were convicted. The respondent was first brought before the court on 25 January 1985 whence he pleaded not guilty to the charges and the case was adjourned. The trial was supposed to commence on 7 May 1985 but was, at the instance of counsel for the other two accused, adjourned to 8 May 1985. Evidence was thereafter adduced on 8, 9 & 10 May 1985; 17 & 31 July 1985; and 1 & 2 August 1985. The judgment, acquitting the respondent, was delivered on 18 September 1985. The Public Prosecutor on 26 September 1985 filed its appeal against the judgment. The grounds of judgment was despatched to the Public Prosecutor on 8 November 1990. The Public Prosecutor filed its petition of appeal on 21 November 1990. More than two years after that, the Sessions Court prepared and forwarded the record of appeal to the High Court on 4 January 1993. The respondent was charged for something that happened on 4 June 1984. This appeal came up for hearing on 2 February 1993 and 4 May 1993 but the respondent on both occasions could not be served with the notice of hearing and hence the adjournment to 8 June 1993, whence the appeal was at last heard, *albeit*, more than 9 years after the event and more than 8 years after the Public Prosecutor had filed its notice of appeal.

II. The Charges

The two charges against the respondent, of which he was discharged and acquitted, are as follows:

Charge 1

> That you on 4 June 1984, at about 9.00 a.m. at the Jabatan Pendaftaran Negara Tawau, Jalan Masjid, in the District of Tawau, in the State of Sabah, pretended to hold the office of a Registration Department Officer of the Jabatan Pendaftaran Negara Tawau, knowing that you did not hold such office, and in such assumed character did an act, to wit, you claimed to one Palurui bin Hassan that you could process the report of lost identity card of one Kamaruddin bin Hj. Tola, a worker of the said Palurui bin Hassan, under colour of such office, and that you have thereby committed an offence punishable under s. 170 of the Penal Code (FMS Cap. 45).

Charge 2

> That you on 4 June 1984, at about 9.00 a.m., at the Jabatan Pendaftaran Negara Tawau, Jalan Masjid, in the District of Tawau, in the State of Sabah, did corruptly solicit for yourself a gratification to wit cash in the sum of RM150 from one Palurui bin Hassan as an inducement to you for doing something in respect of a matter proposed to take place to wit, to process the report of a lost identity card of one Kamaruddin bin Hj. Tola and that you have

thereby committed an offence punishable under s. 3(a)(i) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act No. 57).

The relevant evidence and the grounds of decision had to be reproduced to see whether any of the grounds of appeal can be sustained.

III. Evidence of Case

Palurui bin Hassan (PW4) on 4 June 1984 brought his worker to the National Registration Department, Tawau, for the purpose of applying for a replacement of an identity card lost by his worker. At the said office, the respondent wore a name tag and was seated beside another accused. PW4 showed the respondent the various documents needed for the issue of a replacement identity card and asked the respondent: "Boleh bikin inikah?". The respondent replied that it could be done as long as PW4 had the money and the respondent mentioned RM150 and the respondent also said to PW4 that if there was no money it could not be done. The respondent also said to PW4 that he did not work there and that he had asked him to see the 2nd accused. PW4 thereafter approached the second accused who was seated beside the respondent and was also told by the second accused that it could be done as long as PW4 had RM100. PW4 also testified that he was of the impression that the respondent was a staff of the said department because he sat in the office and wore a name tag. PW4 refused to give the money and went immediately to lodge a report with the Anti-Corruption Agency ("ACA"). The ACA on 5 June 1984 laid a trap by giving PW4 RM100 and an officer of the ACA ("PW5") accompanied the respondent to the department. In the presence of PW5, PW4 approached the third accused to ask where the respondent was and the third accused replied that the respondent was not in. PW4 and PW5 then went downstairs and while there, they were approached by a person called Kamaruddin (not called as a witness and who had absconded) who said he could assist in the application for an identity card if he was given money which was intended for either the second accused or the third accused. PW4 then gave Kamaruddin RM50. PW4, PW5 and Kamaruddin then went back to the office and Kamaruddin approached the third accused to help process the application. The third accused demanded money from Kamaruddin but upon discovering that it was PW4 who really wanted the application processed, the third accused asked PW4 about a "previous debt" of RM150. PW4 then went to the respondent who took the documents and RM50 from him and, after placing the items under some files, asked PW4 to wait. PW4 then approached the second accused for help but was told by the second accused that it could be done if he had RM100. The respondent and the second accused thereafter asked PW4 to see their supervisor, PW1, but PW4 was asked by PW1 to see the staff in charge. PW4 then again approached the second accused for help but was told that he had come the day before without enough money. The third accused answered a phone call after which the respondent and the two accused all refused to attend to the matter. PW4 after retrieving the documents and the RM50 from under the files then left the department. PW4 later, upon the insistence of his worker, returned to the department and was approached again by the said Kamaruddin who again offered to help whereupon PW4 gave RM30 and some documents to Kamaruddin. The worker followed Kamaruddin while PW4 again went to the ACA to lodge another report. Officers of the ACA then went to the department and arrested Kamaruddin and found the RM30 and said documents on his person. Kamaruddin was arrested, released on court bail but had absconded. Evidence was led that on 7 June 1984 the respondent had approached PW1 to tell the ACA that the respondent was a staff of the department. Other evidence were led that the respondent had free access to the various offices and documents of the department.

Those were the evidence upon which the respondent was called to give his defence. The evidence of the respondent, who was undefended, were mostly elicited by cross-examination.

The respondent in his evidence said he was not a staff of the department though he did a lot a things normally associated with a staff of the department, including preparing receipts in respect of application for identity cards. He admitted wearing a name tag. The staff of the department all chipped in to pay him some money when the staff received their salaries. Photographs were produced to back up his allegations that he had free access to areas of the department where identity cards were kept and of his partying with the staff of the department. Apart from admitting to being in the office of the department on 4 and 5 June 1984, the respondent denied demanding money from PW4. He

said that on 4 June 1984, PW4 came with his worker to see him about the lost identity card and he told PW4 that he had no authority to do so. PW4 thereafter left but came back the next day, that is 5 June 1984, and handed him all the necessary documents. He denied that there was any RM50 accompanying the documents. He did not issue any receipt in respect of the application for a replacement identity card because he had no authority.

Those are the evidence that concern the present appeal. I will now turn to the judgment of the learned President.

IV. The Judgment of President

I will reproduce only the part of the grounds of decision that concerns the respondent and only that part that concerns Charge 2, *viz*:

> On the charge under s. 3(a)(i) of the Act I am satisfied that at the material time PW4 had approached the [respondent] to report about the loss of identity card of his worker. I accept PW4's evidence that the [respondent] demanded RM150 from PW4. Eventhough Kamaruddin was not called to testify as his whereabouts could not be traced nevertheless it is my considered opinion that the incident which took place a day after was a very important and strong circumstantial evidence to prove there was an earlier demand made by the [respondent] to PW4. There is the evidence of PW4 corroborated by PW5 that the [respondent] accepted exhibits P7 and P10 and the money from PW4 and placed it underneath some files on his table. It is also in evidence that the [respondent] asked PW4 to see the second accused. From his manner on 5 June 1984 it could be inferred that at the material time he did in fact meet PW4 and solicit from him RM150 for the above-mentioned purpose. It is therefore my finding that the ingredients of the offence have been proved. The prosecution had succeeded in establishing a *prima facie* case against the [respondent] ... In their defence all the three accused elected to give evidence on oath.
>
> ... In respect of the charge under s. 3(a)(1) of the Act the evidence of PW4 and the [respondent] as is discussed above is relevant here. It follows therefore that since PW4 testifies that he was told by the [respondent] to see the second accused as he did not work there then the event on 5 June 1984 do not corroborate the alleged commission of the offence a day earlier. There was no proof that the [respondent] demanded money from PW4 on 5 June 1984. The only relevant evidence was that PW4 gave RM50 and the documents to the [respondent] who took them and put the same underneath some files. However he did not demand any money from PW4. When he took the money his conduct in doing so implies two things namely either he accepted the money for himself or he accepted it for the second accused bearing in mind the first accused told PW4 to see the second accused as he did not work there. However the prosecution does not prove that when the [respondent] took the money he did so for himself or for the second accused. There is therefore no certainty in the evidence. Thus it is my opinion that it does not corroborate the alleged offence one day before. PW4 is a trap witness, it follows that he is such a person whose evidence requires corroboration. Prudence requires that the Court should demand and the prosecution should adduce some corroborative evidence. With due respect to the prosecution I am of the opinion that s. 18 of the Act does not apply to the present case as there was no payment to the accused on 4 June 1984. For the said section to apply it is plain that a corrupt payment must be made to the accused. Even if I am wrong, in view of the fact that PW4 is a trap witness I have to warn myself of the danger of convicting the accused on the uncorroborated evidence of PW4. (See *Mohamed Taufik v. PP* [1975] 1 MLJ 36). However in the light of the incident on 5 June 1984 clearly there is a doubt on whether the [respondent] demanded any money from PW4 on 4 June 1984 and where there is a doubt, the matter must be resolved in favour of the accused. The prosecution have failed to discharge the burden placed on them. Under the circumstances the [respondent] is acquitted and discharged on this charge as well.

Having set out only the relevant part of the judgment, I will now deal with the grounds of appeal, and only those that would dispose of this appeal.

V. Conclusions

One of the ingredients of the offence under s. 170 of the Penal Code is that an accused person "does or attempts to do any act" under colour of the office he pretended to hold. The alleged act of the respondent as stated in the charge is that he "claimed" to one Palurui bin Hassan that he could process the report of lost identity card. Is, then, a claim by someone that he could do something, "an act" within the meaning of s. 170 of the Penal Code? The claim, in the context of the facts of this case, was merely a verbal assertion by the respondent that he could process the report of a lost identity card. The charge

did not allege that respondent did something in pursuance of his claim nor that the claim induced any one to part with anything. In "Chitaley & Rao's **Commentaries on the Indian Code**, Vol. 2, 2nd Edn., at p. 188, it is, in relation to s. 170 of the Indian Penal Code, said:

> A promise is not an "act".

The then Federal Court in the case of *Tomm Wong v. PP* [1973] 1 MLJ 215 had the occasion to consider s. 170 of the Penal Code by way of reference and it was held that an offence under s. 170 of the Penal Code is committed whenever any person falsely holds himself out to be a public servant and does or attempts to do any act whatsoever under colour of such office. Though the case did not decide on the point in issue here, nevertheless, there is a passage in that judgment which serves to illustrate the meaning of "an act". At p. 216, the passage reads:

> This applicant, Tomm Wong, did pretend to be a detective police constable, which he was not, and in such assumed character wrote out his report, which act, by his signature and false description as "D.P.C. 1209", was an act done under colour of his pretended office.

Therefore, it is obvious that the charge under s. 170 of the Penal Code against the respondent cannot succeed as it discloses no offence; a verbal assertion without anything more, like a promise, cannot be an "act". It would have been a different matter had the charge been that the respondent under colour of such assumed office had caused or induced the delivery to him by Palurui bin Hassan, and he took possession thereof, of documents relating to the processing of a lost identity card; that allegation would constitute an "act". I cannot at this appellate stage of the proceedings amend Charge 1. See *Lee Swee Tee v. PP* [1960] MLJ 161; and *PP v. Sharikat Perusahaan Makanan Haiwan Berkerjasama-berkerjasama* [1969] 2 MLJ 250. It is not in the interest of justice that the respondent be ordered to stand trial again on an amended charge since the event occurred more than 9 years ago; the respondent had surely been prejudiced by this long lapse of time. See *PP v. Kian Mei Sdn. Bhd.* [1992] 4 CLJ 2168. The appeal against the acquittal of the respondent of charge (1) is therefore dismissed. It is, therefore, not necessary to refer to the grounds of judgment nor to the grounds of appeal relating to Charge 1, in view of my ruling.

The respondent was, as earlier stated, also acquitted of the charge, under s. 3(a)(i) of the Prevention of Corruption Act 1961, of corrupt solicitation of RM150 from one Palurui bin Hassan (PW4) as an inducement to process the report of a lost identity card of one Kamaruddin bin Hj. Tola. The learned DPP contended that the learned President had erred in law in failing to recognise that the entrapment on 5 June 1984 following a report by PW4 to the ACA together with the evidence of PW5 would have provided the corroboration of the fact that a solicitation was made a day earlier. The learned President had in fact, when he ruled for a *prima facie* case, stated that there was such corroboration. When the learned President considered whether the respondent had raised a reasonable doubt as regards charge (1) he said:

> There was no attempt by the staff to tell him to leave whenever he was in the Department. The [respondent] seemed to know the function of and procedure followed by the Department. For instance when PW4 gave him RM50 and the documents and asked him to write a receipt for the lost identity card he knew that PW4 asked him to put up the HNR6 form. During cross-examination by the prosecution he also gave the impression that he was well versed with the work of the Department..

It would appear that the learned President had ruled that PW4 had in fact given the respondent RM50 on 5 June 1984 together with the said documents. He had before that also ruled that PW4 "is a truthful witness" and that he had no hesitation to accept his evidence. There is therefore substance in the contention that the learned President had failed to appreciate that there was corroboration of the evidence of PW4 that the respondent had solicited RM150 from PW4. It matters not whether the RM50 given on 5 June 1984 was for the respondent or for the other accused nor does it matter that the respondent had not demanded the RM50 on 5 June 1984 because those facts, which were offered by the learned President as creating a doubt in the prosecution case, do not in any way detract from, contradict or rebut the evidence of PW4 that the respondent had solicited from him RM150 on 4 June 1984 and which evidence was corroborated by the fact of a report of PW4 to the ACA, which was made at 10.45 a.m. on 4 June 1984 to PW7, an officer of the ACA and reduced into writing by another officer, PW9. (See s. 157 of the Evidence Act; *Lim Baba v. PP* [1962] MLJ

201; *Liew Wah Ming v. PP* [1963] MLJ 82 per Hill JA.; *Mohamed Ali v. PP* [1962] MLJ 230, at p. 231; and *Karthiyayani & Anor. v. Lee Leong Sin & Anor.* [1975] 1 MLJ 119, at p. 120). The learned President had ruled that PW4 is a truthful witness, and, in fact it was upon his evidence that the other two accused were convicted of solicitation. He had also ruled that there was corroboration. Given those conclusions of the learned President, it would require very solid grounds to hold that the defence had cast a reasonable doubt on the prosecution case and none of the grounds mentioned by the learned President, which I had just set out, could create any doubt in the case of the prosecution. See *PP v. Lim Kuan Hock* [1967] 2 MLJ 114. On the overwhelming evidence, the respondent ought to have been convicted. I therefore set aside the order of discharge and acquittal and instead convict the respondent of the offence of corrupt solicitation on 4 June 1984 of RM150 from one Palurui bin Hassan under s. 3(a)(i) of the Prevention of Corruption Act 1961. I will hear the respondent before I sentence him.

TAN SEE HOCK

v.

DEVELOPMENT & COMMERCIAL BANK BHD. & ANOR.

HIGH COURT, JOHOR BAHRU
DATO' JAMES FOONG J.
[ORIGINATING SUMMONS NO. 31-362 OF 1987]
4 JULY 1993

LAND LAW: Reversion of land to State Authority - National Land Code 1965, ss. 199(1), 131 - Effect - Whether reversion extinguished all prior titles and interest over land - Previous chargee pleaded indefeasibility of interest despite reversion - s. 340 - Whether plea maintainable.

LAND LAW: Caveats - Removal - s. 326 National Land Code 1965 - Registrar of Titles issued notice to remove plaintiff's caveats - Notice based on application by defendant - Defendant's registered interest in land already extinguished - Whether notice of Registrar void and ultra vires.

WORDS AND PHRASES: "Interest" - National Land Code, 1965 s. 326.

The plaintiff entered into a joint venture agreement with a housing developer to develop his land into a housing estate. Pursuant to the agreement the plaintiff transfered the said land to the developer as trustee who in turn had it charged to the defendant by way of a first legal charge for financial facility.

Application for subdivision of the said land was approved by the authority and following the adopted procedure in the State of Johor the land was surrendered to the State Authority under s. 195 of the Code for re-alieanation and subsequent issuance of individual sub-divided titles. The authority then cancelled the original document of title of the land (of which the plaintiff was registered proprietor) and in its stead issued 71 sub-divided documents of titles with the name of the developer as the registered proprietor. All the titles were re-issued free from any incumbrances and hence without the first legal charge of the defendant registered thereon.

The intended housing project failed to materialise with the result that both the plaintiff and the defendant lodged their respective caveats over the said land. The defendant claimed indefeasibility of interest under s. 340 of the Code and applied to the Registrar of title for removal of the